

MULTICHOICE GROUP SUBMISSION

**COPYRIGHT AND
PERFORMERS PROTECTION AMENDMENT
BILLS**

16 JULY 2021

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INTRODUCTION

- 1 Electronic Media Network Pty Ltd ("M-Net") and MultiChoice Pty Ltd ("MultiChoice") thank the Parliamentary Portfolio Committee on Trade and Industry ("Portfolio Committee") for the opportunity to make written submissions on specific clauses of the revised Copyright Amendment Bill [B13B-2017]¹ ("the Copyright Bill") and alignment of both the Copyright Amendment Bill and Performers' Protection Amendment Bill [B24B-2016] ("PPA Bill") with obligations set out in International treaties. As licensed subscription broadcasters, we are investors in and users of a range of works of copyright. We are also the authors of our own works (in the form of broadcasts). The policy and legislative framework governing copyright matters are thus of critical importance to us and the entire broadcasting industry.

- 2 M-Net and MultiChoice are involved in the production, acquisition and distribution of local and international content. We are committed to nurturing South African talent and invest around R2 billion a year in the production of local television programming and the acquisition of locally produced television channels:
 - 2.1 M-Net acquires local programmes, which are packaged into channels. Some of M-Net's major local channel brands include M-Net, Vuzu, kykNet and the AfricaMagic channels.

 - 2.2 MultiChoice, in addition to broadcasting M-Net's channels, acquires channels from local and international suppliers. Local channels acquired by MultiChoice include Mindset Learn, Dumisa, ENCA, SABC News, Home Channel, Ignition, CNBC Africa Gautv and Business Day TV.

- 3 MultiChoice has also pioneered the introduction of video-on-demand services to the South African market with services like DStv catch-up (which allows

¹ Copyright Amendment Bill [B13B-2017] - clause 13 (sections 12A, 12B, 12C and 12D), clause 19 (section 19B) and clause 20 (section 19C)

subscribers to watch content in their own time) and DStv BoxOffice (a movie rental service).

- 4 M-Net and MultiChoice welcome efforts to improve the financial well-being of authors (in the broad copyright sense) and performers (by which we mean actors, singers, musicians and dancers) in South Africa. It is in the interests of all stakeholders in the entertainment industry, including content producers and broadcasters, that authors and performers remain incentivised to create original copyright works. However, incentivising the creation of original copyright works and performances requires a fair and equitable balance to be struck between the authors and performers of the works, on the one hand, and the commercial interests of those parties who are willing to invest in that creation (e.g. broadcasters, film companies, production houses and employers more generally) on the other hand.
- 5 The reality is that investors are an essential and integral part of the production ecosystem and they must therefore be encouraged to invest in the creation of original work, by having the opportunity to generate a return on their investment. Simply put, any measures which increase the cost of creating original South African television content, may have the unintended consequence of reducing investment in television production and, ultimately prejudicing the performers and authors that the measures were intended to protect in the first instance.
- 6 Broadcasters are at present significant investors in local content creation and the local production industry. As we've already indicated, M-Net and MultiChoice invest approximately R2 billion a year in local content. The SABC makes investments of a similar magnitude. Through these investments, public and commercial broadcasters generate thousands of hours of original content annually. This, in turn, has a direct and positive effect on employment. Increasing investment in the film and television industry is vital to the growth of the industry and will have a significant impact on both output and employment. Investors rely on a strong and predictable legislative framework to protect investments made in the production of local content. Copyright policy and legislation cannot only consider the rights and obligations of creators and users of works of copyright without taking into account the implications of any proposal on investment. The

Bills should reflect an appropriate balance between the rights and obligations of a range of stakeholders – creators of works, the investors/broadcasters who invest in the creation of works, and the public, who use and benefit from the works created.

- 7 M-Net and MultiChoice recognise that the Bills has many laudable objectives and that a number of the amendments proposed in the Bill are long overdue. In respect to those objectives and amendments, we have engaged with the Portfolio Committee since the very beginning of this process and have made constructive proposals on the drafting of those provisions.

SCOPE OF THESE SUBMISSIONS

- 8 We note that the advertisement expressly pointed out that the "*call for further submission is in response to the President's reservations in that various sections of the Bill, including section 12A, which deals with the fair use of a work or the performance of a work, was not put out for public comment before the final version of the Bill was published and that certain copyright exceptions may be unconstitutional.*" The advertisement then requested the public to submit written submissions with reference only to clause 13 (sections 12A, 12B, 12C and 12D), clause 19 (section 19B) and clause 20 (section 19C) of the Copyright Amendment Bill [B13B-2017]. We note that these were not the only clauses about which the President expressed reservations. Many of his reservations, upon which we have previously made comment, including retrospectivity, arbitrary deprivation of property and the Minister's powers have not been addressed and no further comment has been requested. Based upon the Portfolio Committee's report and recommendations to the National Assembly prior to the Bill being re-committed to the Portfolio Committee we assume that is because the Portfolio Committee has noted the Presidents concerns and these clauses will be deleted. Based on that assumption we have made no comments on those clauses. If that is not the case we trust that the Portfolio Committee will provide an opportunity for public comment on those specific clauses which the President expressed his reservations.

- 9 We wish to put it on record that these specific clauses mentioned by the President and which are set out in the notice inviting public comment are not the only clauses that were not put out for public comment before the final version of the Copyright Bill was published. Discussions on fair use/fair dealing and the exceptions have dominated the discourse on this Bill in Parliament and the Media, with the result that other critical provisions for the television production and broadcasting sector, which were changed materially from when the Bill was published in 2017, have not been properly considered. For example, amongst others, clauses on definitions, nature of copyright works and related royalty payment, communication to the public, ownership of copyright and assignment and licences in respect of copyright. The Portfolio Committee under the Fifth South African Parliament did not invite comment on these material changes, again choosing to focus on specific sections of the Copyright Bill. We made extensive submissions to the Portfolio Committee at the time, but it appears that no regard was paid to our proposals as they went beyond the narrow sections on which comment had been requested. In our view, the decision by this Portfolio Committee to once again, not invite comment on all aspects of both Bills, perpetuates the procedural defect caused by the previous Portfolio Committee's process. As a result, there has been inadequate public consultation on several important aspects of the Bill.
- 10 When early drafts of the Copyright Bill were discussed at the National Economic Development and Labour Council (Nedlac) a number of flaws were pointed out. In our view, the Bill should have been further developed through constructive engagements in this forum before proceeding to Cabinet and Parliament. However, despite the concerns raised at Nedlac, the Bill was still introduced to Parliament by the Minister on 16 May 2017. After the Portfolio Committee had invited public comment, received submissions and held public hearings in 2017 it was clear to the Portfolio Committee that there were still significant problems with the Bill which would require substantive re-drafting to address. It was also clear based on audio recordings of the Portfolio Committee (available on pmg.org.za) that these flaws were not just technical amendments, but also policy decisions usually dealt with by the executive arm of government. It is at this point that the Portfolio Committee should have had in mind the old Kenyan proverb

"that a fully grown tree cannot be bent into a walking stick" and referred the Bill back to the Minister and Department for further work instead of continuing to attempt to shape it into a more pleasing form.

- 11 As the Portfolio Committee wished to finalise the Bill before the end of the term of fifth Parliament, there was a rushed process and limitations were placed on which clauses and sections the public were permitted to comment on. These limitations were detrimental to the public process and undermined section 59(1) of the Constitution that requires the National Assembly to facilitate public involvement in its legislative and other processes. Before finalisation, the Bills as whole should have been published for public comment to allow for consolidated input on all aspects of the Bill. There should also have been an extensive socio-economic and regulatory impact assessment by credible experts. Bearing in mind the highly specialised nature of copyright law, the Bill should also have been submitted by either Parliamentary legal services or the State Law Advisors to a Senior Counsel specialising in copyright law.
- 12 The Copyright Bill, as it stands now, despite commendable objectives is an ill-conceived and poorly drafted piece of legislation which, if promulgated in its current form, will likely lead to legal uncertainty, litigation and, most importantly, the further impoverishment of the very people that it seeks to benefit and protect.
- 13 A particular cause for concern (but by no means the only one), is that a Bill which was supposed to be updated to take account of digital technology developments, and implement Treaty obligations in this regard from 1996, 2012 and 2013 and which entered Parliament in 2017 is now completely out of step with the policy developments and technology advances that have happened in the interim.
- 14 The Bill is still trying to deal with the 3rd Industrial revolution (the digital revolution), whereas we are now in the 4th Industrial Revolution (4IR) and no attempt has been made to carry out a socio-economic impact assessment of this Bill in relation to the policy process that government has undertaken around 4IR and the recommendations of the Presidential Commission on the Fourth

Industrial Revolution (PC4IR).² This is fairly important as government wishes to take advantage of 4IR to benefit South Africa and this benefit will primarily be in the area of developing intellectual property rights in content, services and technologies. The Copyright Bill as it stands now does not incentivise creation, innovation or investment in content and 4IR based technology protection measures.

- 15 Our primary submission is that the Copyright Bill is so fundamentally flawed and out of step with recent events that the process of drafting may need to be started anew and that the Bill ideally should be referred back to the Minister and the Department of Trade and Industry for re-drafting to take into consideration the impacts the Bill on South Africa's 4IR objectives before being introduced again to Parliament. Failing that, now that it has been re-committed by the National Assembly to the Portfolio Committee in the Sixth Parliament it should at the very least be dealt with holistically by the Portfolio Committee rather than in a piecemeal fashion and with limitations on the public consultation process required by the Constitution. This would allow for a Bill which provides a coherent and economically sustainable framework that will allow for the continued investment in, and exploitation of, copyright works as well as the protection of South African creatives.
- 16 In stark contrast to the Copyright Bill, the PPA Bill only requires amendments in several specific instances, insofar as the legality of the Bill is concerned to address issues around freedom to contract, impermissible delegation to the Minister and unreasonable administrative actions and penalties, which will not require substantial re-drafting or delay its progression. MultiChoice and M-Net would in fact welcome the promulgation of the PPA Bill with these key amendments in the interests of protecting the rights of performers. To achieve this objective we would recommend that the PPA Bill be de-linked at this stage from the Copyright Amendment Bill so that it can rapidly progress through Parliament on its own merits and that the Portfolio Committee request public comment on legal and functional issues that affect the drafting of the PPA Bill so

² Government Notice 591 of 2020, Government Gazette No. 43834

that it may be finalised by the National Assembly and sent back to the President for assent.

SECTION A: COPYRIGHT BILL AND INTERNATIONAL TREATIES

- 17 The Portfolio Committee invited submissions on the alignment of the Copyright Bill and the PPA Bill with the obligations set out in international treaties, including the World Intellectual Property Organisation (WIPO) Copyright Treaty (WCT), the WIPO Performance and Phonograms Treaty (WPPT), and the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled. We will not dwell at any great length on the specific sections of the Copyright Bill pertaining to exceptions. Our focus will be on sections, such as those pertaining to the technology protection measures (TPMs) which are both Treaty related and exceptions related. These sections have largely been overlooked throughout this lengthy process. This despite the fact that one of the primary reasons for the update to our copyright law is to align with International Treaties and protect the owners of copyright works and performers from unauthorised use of their works. However, we will do an illustrative analysis of just one exception, s19D, to show just how the Copyright Bill often goes far broader than the relevant Treaty, in this case the Marrakesh Treaty, which read together with s28P on circumvention of TPMs may create potential harm to the rights of creators and owners of copyright works .

Technology Protection Measures (TPMs) and the Marrakesh Treaty

- 18 M-Net and MultiChoice previously made extensive submissions on TPMs to the Portfolio Committee. We highlighted that there are broadly speaking two types of technological protection measures, namely "access control" TPMs and "copy control" TPMs. TPMs using both "access control" and "copy control" technologies are a critical tool used by broadcasters and other copyright holders in the protection of copyright works against piracy and we previously proposed in submissions to the Portfolio Committee that the definition of TPMs in the Copyright Bill should be broadened to include both types of TPMs. The Portfolio Committee ultimately decided not to broaden the definition to include "access control" TPMs, possibly because of the Cybercrime Bill which was being dealt

with by another Parliamentary Portfolio Committee at the same time or because circumvention of "access control" TPMs is never permitted except in very limited circumstances. Ultimately, the Cybercrime Bill, which later became the Cybercrimes Act, focused on computer crime and did not address broadcast signal piracy issues.

19 Subsequently, the Minister of Communications and Digital Technologies has published a draft White Paper on Audio and Audiovisual Content Services that notes that the Copyright Bill and the PPA Bill *"have not addressed signal piracy and their definition of Technology Protection measures do not extend to broadcasting technology protection measures."*³ Accordingly, the draft White Paper *"proposes that legislative and regulatory mechanisms to strengthen protection against signal piracy must be introduced in the Electronic Communications and Transactions Act..."*⁴ Consequently, M-Net and MultiChoice wish to bring it to the attention of the Portfolio Committee that despite our earlier submissions requesting a broadening of the definition, those submissions have now been overtaken by the events outlined above and we now support the retention of the current definition of TPMs in the Copyright Bill that explicitly excludes "access control" TPMs in part (b) of the definition. That issue having been clarified; we turn to deal with the treatment of TPMs in the Copyright Bill.

20 Article 11 of the WCT requires that:

"Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this

³ Draft White Paper on Audio and Audiovisual Content Services Policy Framework: A New Vision for South Africa 2020, published by the Minister of Communications, Department of Communications and Digital technologies. Government Gazette, No.43797, Notice No. 1081, 9 October 2020, para 5.6.8

⁴ Draft White Paper on Audio and Audiovisual Content Services Policy Framework: A New Vision for South Africa 2020, published by the Minister of Communications, Department of Communications and Digital technologies. Government Gazette, No.43797, Notice No. 1081, 9 October 2020, Para 5.6.9

Treaty or the Berne Convention and that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law."⁵

- 21 Article 18 of the WIPO Performances and Phonograms Treaty contains a parallel provision that:

"Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by performers or producers of phonograms in connection with the exercise of their rights under this Treaty and that restrict acts, in respect of their performances or phonograms, which are not authorized by the performers or the producers of phonograms concerned or permitted by law."⁶

- 22 The WCT and the WPPT came about because of advances in digital technology which created new opportunities for content to be distributed and offered users new means to receive and appreciate content. These technological advances also created a challenge for the protection of copyright works. How can one protect a copyright work in a digital world where copying is easy and inexpensive, where every copy made whether from an original or a copy is flawless and distribution to consumers anywhere in the world via the Internet is virtually cost free and immediate?⁷

- 23 The advances in digital technology have meant that copyright infringement no longer requires dedicated pirates with access to expensive reproduction equipment and physical distribution channels. Now any consumer with access to a computer and the Internet can make and distribute unauthorised high-quality copies of literary, audio and video works for profit or non-profit purposes.⁸ The fact that most home users who engage in this form of piracy do not up-load unauthorised copies to online websites for commercial benefit, does not deter

⁵ WIPO Copyright Treaty (WCT) 1996

⁶ WIPO Performances and Phonograms Treaty (WPPT) 1996

⁷ Marks, D.S. and Turnbull, B.H. 1999. "Technical Protection Measures: The Intersection of Technology, Law and Commercial Licenses" at Workshop on implementation Issues of the WIPO Copyright Treaty (WCT) and the WIPO Performance and Phonograms Treaty (WPPT), held by the World Intellectual Property Organisation (WIPO) in Geneva, on 6 & 7 December 1999 (WCT-WPPT/IMP/3), pg 1

⁸ Marks, D.S. and Turnbull, B.H. 1999. "Technical Protection Measures: The Intersection of Technology, Law and Commercial Licenses" at Workshop on implementation Issues of the WIPO Copyright Treaty (WCT) and the WIPO Performance and Phonograms Treaty (WPPT), held by the World Intellectual Property Organisation (WIPO) in Geneva, on 6 & 7 December 1999 (WCT-WPPT/IMP/3), pg 1

those online websites from generating profit from advertising revenue based on the number of users uploading and downloading from their websites. These websites cause substantial economic harm to copyright owners, authors, artists and performers.

- 24 The answer for copyright owners to address this harm was to use technology (i.e. TPMs) against technology, to prevent reproduction. However, TPMs by themselves will always be vulnerable to technologies specifically developed to circumvent them and thus, there needs to be legal protection against the circumvention of TPMs and penalties for circumventing them for the purposes of piracy.⁹
- 25 This is why the WCT and the WPPT oblige signatories to provide adequate legal protection against circumvention of TPMs. The treaties do not specifically provide for exceptions to this obligation, but at workshops hosted by WIPO on implementation of the two Treaties it has been noted that *"Any possible exceptions to anti-circumvention law should be narrowly crafted and restricted to special cases that do not defeat the normal functioning and application of protection technologies and do not unreasonably prejudice the legitimate interests of content owners in employing such protection technologies. Because devices and services, by their very nature, cannot be restricted to particular uses, exceptions to anti-circumvention laws do not appear well suited to devices and services. Rather, they are better considered in relation to certain types of individual conduct and subject to a set of reasonable conditions."*¹⁰
- 26 It is therefore clear that any exception to the TPM circumvention prohibition must be narrowly formulated so as not to defeat the purpose of the legislative

⁹ Marks, D.S. and Turnbull, B.H. 1999. "Technical Protection Measures: The Intersection of Technology, Law and Commercial Licenses" at Workshop on implementation Issues of the WIPO Copyright Treat (WCT) and the WIPO Performance and Phonograms Treaty (WPPT), held by the World Intellectual Property Organisation (WIPO) in Geneva, on 6 & 7 December 1999 (WCT-WPPT/IMP/3), pg 3

¹⁰ Marks, D.S. and Turnbull, B.H. 1999. "Technical Protection Measures: The Intersection of Technology, Law and Commercial Licenses" at Workshop on implementation Issues of the WIPO Copyright Treat (WCT) and the WIPO Performance and Phonograms Treaty (WPPT), held by the World Intellectual Property Organisation (WIPO) in Geneva, on 6 & 7 December 1999 (WCT-WPPT/IMP/3), p.9

protections afforded to a copyright owner. They must also focus on an individual's conduct rather than on the device itself. .

- 27 It should be noted Article 10 of the WCT and Article 16 of the WPPT in accordance with the Berne Treaty, confine the acts "permitted by law" to any limitations of or exceptions to rights provided for in the treaties to certain special cases which do not conflict with the normal exploitation of the works and do not unreasonably prejudice the legitimate interests of the owner of the works.
- 28 In line with the WCT and the WPPT obligations, the Copyright Bill (by way of clause 27) inserts s28O into the Act on prohibited conduct in respect of TPMs. It should be noted that subsection (6) in s28O in the Copyright Bill which refers to sections 86, 87 and 88 of the Electronic Communications and Transactions Act ("ECT Act") will need to be re-drafted to refer to relevant sections in the Cybercrime Act instead as these sections of the ECT Act referenced in the Copyright Bill have been repealed by that Act.
- 29 However, M-Net and MultiChoice are concerned about the current drafting of s28P (which deals with exceptions to s28O). As presently formulated, it permits broad-scale circumvention of TPMs and effectively renders s28O for the protection of TPMs in the Copyright Bill nugatory. It's becomes impossible to enforce TPMs because the infringer will simply claim ownership or the device or trading of circumvention devices are for fair use reasons.
- 30 In s28P(1) any person can use a TPM circumvention device to perform any act permitted in terms of any exception provided for in the Copyright Bill (considering the fair use approach employed in exceptions and limitations clauses that is extremely broad), or sell, procure for use, design, adapt or be in possession of any device, including a computer program, to overcome security measures for the protection of data for any exception permitted by the Copyright Bill. The exception in s28P is so broad that it ultimately harms the general effectiveness of the TPM to prevent copying of works. This is because once a "hack" to TPMs has been developed to allow legitimate access in terms of the exceptions permitted by the Bill, it can also thereafter be used to make unauthorised copies which are not permitted by the Bill.

- 31 This is a specific area where the "fair use" or "fair dealing" exceptions approach of the old analogue world do not align well with digital devices and services. As the harm to the rights holder in the digital world is far greater due to the ease of reproduction, the high quality of the copy made and the ability to distribute the copy globally than the harm caused by the same action in the analogue world. For example, in the analogue world if a person made a fair use copy of a video cassette, and it was then illegally distributed to that person's friends the harm would be localised. In the digital world, a digital copy is not confined to a physical medium and could rapidly be distributed globally through streaming websites creating harm in perpetuity to the rights holders ability to exploit their rights in different markets around the world. In this case, implementation would best be served not with permitting circumvention (and the trade in circumvention devices), but instead using the power of digital technologies to provide solutions, for example "copy once" permissions that allows a user who purchased a work to make a single copy or providing the user who purchases a physical copy the right to access digital copies in an online library thereby negating the need for the user to make their own copies.
- 32 The "one size fits all approach" of S28P also entirely overlooks that a legitimate and reasonable right to circumvent a TPM in respect of say for example a cinematograph film offered on DVD or Blu Ray may not necessarily be legitimate or reasonable in the context of a cinematograph film via broadcasts or programme-carrying signals and stored on a set top box decoder (STB) hard drive. This is because circumvention of "copy controls" TPM on the STB hard drive would secure access not only to content to which the user may have a reasonable public interest right to access in terms of the Copyright Bill, but also expose content to which they do not have a right to access. For example, the hard drive of the DStv Explora stores both broadcasted content and rental movies.
- 33 The gross overreach for circumvention of TPMs does not stop there. s28P(2) also contemplates a situation where a person may face difficulty in the circumvention of the TPMs on their own as permitted by s28P(1) and creates an opportunity for them to request the copyright owner for assistance in

circumventing the TPMs to perform the permitted act in s28P(1) and if the copyright owner refuses their request or failed to respond in a reasonable time engage the services of a third party to assist them with the circumvention of the TPMs.

- 34 Effectively, provisions of s28P(2) enable persons who wish to circumvent a TPM to take the law into their own hands. All that they need do is to give notice that they intend to circumvent the protection measure (citing a provision of the Act justifying its conduct, which may be entirely spurious and unfounded) and they are then entitled, upon the owner's refusal to grant consent to a third party, to proceed to circumvent the measure. This effectively nullifies the protections sought to be introduced by s28O of the Act for TPMs. s28P falls foul of the Treaty obligations in that it undermines the obligation of adequate legal protection by not being "*narrowly crafted and restricted to special cases*".
- 35 When drafting s28P neither the Department of Trade and Industry, nor the Portfolio Committee made any attempt to develop a more nuanced approach or even take into consideration:
- 35.1 The general availability of works (not individual formats);
 - 35.2 the impact that any possible exception to the prohibition against circumventing TPMs would have on the value of works and the efficacy of protection technologies;
 - 35.3 the existence of any licensing agreements between rightsholders and public libraries and archiving institutions,
 - 35.4 any copying opportunities that are in practice being built into copy protection measures for fair use or fair dealing,
 - 35.5 how digital licences use innovative solutions to deal with exceptions
 - 35.6 any voluntary technical measures to facilitate exceptions and limitations to the rights of content owners that have been taken or other steps taken by government to ensure access which would negate the

need for exceptions to the general prohibition against circumvention of TPMs.

- 36 To avoid general harm to the effectiveness of TPMs, the only circumstance in which a technological protection measure circumvention device should be permitted to be used is:
- 36.1 for law enforcement purposes by an authorised State investigative, protective or intelligence agency in accordance with applicable laws;
 - 36.2 where the owner of the technological protection measure has consented to that use;
 - 36.3 where ordered by a court or the Tribunal after the owner has refused access;
 - 36.4 where a person authorised by government in terms of s19D for the benefit of persons with disabilities; and
 - 36.5 where a person authorised by government in terms of s19C for libraries, archives, museums and galleries.

Note: In s19D in the Copyright Bill there has been an attempt to put in place a government managed regime to authorize persons to make copies for persons with disabilities without first obtaining the permission of the owner of the works. A similar provision should be considered for s19C. Where government has authorised a person in terms of s19D and s19C there should also be a requirement to keep records of such circumvention of TPMs for inspection as may be prescribed in regulation. There should also be kept a record of a reasonable attempt being made to obtain a copy without TPM from the owner of the works.

Mandatory limitations and exceptions for persons with disabilities

- 37 South Africa is not a signatory of the Marrakesh Treaty to facilitate access to published works for persons who are blind, visually impaired or otherwise print disabled ("the Marrakesh Treaty"). However, in line with the Marrakesh Treaty

the Copyright Bill seeks to create a mandatory limitation and exception for persons with disabilities in clause 20 which inserts s19D. M-Net and MultiChoice support this objective, but note that as currently drafted when read together with clause 27 of the Copyright Bill which inserts s28P relating to the circumvention of TPMs this might lead to unreasonable infringement of copyright. To cure this ill it is proposed that s19D and the Copyright Bill should more closely follow the language of Marrakesh Treaty, properly define the terms used in s19D in the definitions section of the Copyright Bill and provide guidance as to who the persons are that s19D(1) proposes be prescribed to make an accessible format copy for the benefit of a persons with a disability, since these persons will be permitted in terms of s28P to circumvent TPMs.

- 38 This section also needs to be clearer on what copyright works are being made into an accessible format copy. In the Marrakesh Treaty, "works" means "*literary and artistic works within the meaning of Article 2(1) of the Berne Convention for the Protection of Literary and Artistic Works, in the form of text, notation and/or related illustrations, whether published or otherwise made publicly available in any media.*"¹¹ However, the text of Marrakesh Treaty has been imported into the Copyright Bill where "works" is defined as all copyright works thereby creating a far wider application of this section than that in the Treaty it has been copied from where it is limited to literary and artistic works within the meaning of the Berne Convention.
- 39 Similarly, the application of the Treaty is not to all persons with disabilities, but only to the blind and the visually impaired to address the lack of lesser known texts in braille and audio book formats.¹² It is unclear if this was done intentionally or not. If the intention was to include all works and all persons with disabilities whether they require such access or not would not be aligned with the Treaties the country is a signatory of, nor with the test of reasonableness for an exception that infringes on the copyright owner's rights. It also ignores that government has used other means in different media to obtain access for persons with disabilities,

¹¹ Article 2 of the WIPO administered Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled, 2013

¹² Preamble of the WIPO administered Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled, 2013

for example in computer programs to impose requirements for access to persons with disabilities, for telecommunication service providers to provide handsets that cater for persons with disabilities and in broadcasting to impose obligations on licensees to provide audio descriptions and subtitles and make use of other access technologies for persons with disabilities.

- 40 Accordingly it is proposed that wherever "works" appears in s19D it be prefaced by "literary or artistic" to align with the Marrakesh Treaty and South Africa's obligations under the Berne Convention. Furthermore, it is proposed that the following text based on definition of beneficiaries in Article 3 of the Marrakesh Treaty be included in the definition section of the Copyright Bill:

"Persons with disabilities means a person who:

(a) is blind;

(b) has a visual impairment or a perceptual or reading disability which cannot be improved to give visual function substantially equivalent to that of a person who has no such impairment or disability and so is unable to read printed works to substantially the same degree as a person without an impairment or disability; or

(c) is otherwise unable, through physical disability, to hold or manipulate a book or to focus or move the eyes to the extent that would be normally acceptable for reading; regardless of any other disabilities."¹³

- 41 In s19D an exception is created for a person to make an accessible format copy for the benefit of a person with a disability and yet the Bill then fails to define, as the Marrakesh Treaty did, what an accessible format copy is which once gain unduly broadens the scope of the exception and leaves it up to presumably the Minister or even the court to make such a determination. It is recommended that the definition as contained in Article 2 of the Marrakesh Treaty be inserted in the Definitions of the Copyright Bill:

"Accessible format copy" means a copy of a work in an alternative manner or form which gives a person with disabilities access to the work, including to permit the person to have access as feasibly and comfortably as a person without visual impairment or other print disability. The accessible format copy

¹³ Article 3 of the WIPO administered Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled, 2013

is used exclusively by beneficiary persons and it must respect the integrity of the original work, taking due consideration of the changes needed to make the work accessible in the alternative format and of the accessibility needs of the beneficiary persons;¹⁴

Authorised persons

42 It is clear that s19D(1) intention is to implement Article 4 of the Marrakesh Treaty which has the object of creating an exception that would allow authorised entities to be permitted to make accessible format copies of a literary or artistic work without the authorisation of the copyright owner. However, once again in stark contrast the Marrakesh Treaty, the Bill fails to include a definition of authorised persons.

43 Article 2 of the Marrakesh Treaty defines authorised entities as follows:

"authorized entity" means an entity that is authorized or recognized by the government to provide education, instructional training, adaptive reading or information access to beneficiary persons on a non-profit basis. It also includes a government institution or non-profit organization that provides the same services to beneficiary persons as one of its primary activities or institutional obligations. ¹⁵

An authorized entity establishes and follows its own practices:

- (i) to establish that the persons it serves are beneficiary persons;
- (ii) to limit to beneficiary persons and/or authorized entities its distribution and making available of accessible format copies;
- (iii) to discourage the reproduction, distribution and making available of unauthorized copies; and
- (iv) to maintain due care in, and records of, its handling of copies of works, while respecting the privacy of beneficiary persons in accordance with Article 8."

44 We propose that s19D(1) be amended to reflect the text of the Marrakesh Treaty and that the definition of "authorised entities" in Article 2 of the Marrakesh Treaty,

¹⁴ Article 2 of the WIPO administered Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled, 2013

¹⁵ Agreed statement concerning Article 2(c): For the purposes of this Treaty, it is understood that "entities recognized by the government" may include entities receiving financial support from the government to provide education, instructional training, adaptive reading or information access to beneficiary persons on a non-profit basis

with necessary amendments, be inserted in the Definitions of the Copyright Bill as follows:

"authorised person" means an entity that is authorised or recognized by the government to provide education, instructional training, adaptive reading or information access to persons with disabilities on a non-profit basis. It also includes a government institution or non-profit organization or entities receiving financial support from government that provides the same services to persons with disabilities as one of its primary activities or institutional obligations."

- 45 Inserting the definition as outlined above obviates the need to prescribe who these authorised persons are. We would recommend the following amendments to the text of s19D in the Copyright Bill to align with the text of Article 4, subsection 2 (a) of Marrakesh Treaty. We note that 2(a)(iii) was omitted when this was transposed to the Copyright Bill and have included it as a new s19D(1)(c) in the proposed drafting below. We would propose using the term "electronic communication" which is clearly defined in the Electronic Communications Act, 2005, rather than the narrower term "digital communications" which would exclude any analogue forms of communication which continue to be used throughout Africa. We would also suggest that the sharing of the accessible format copy be permitted to take place between authorised persons. We therefore recommend the following amendments to s19D(1) in the Copyright Bill:

"19D.(1) Any authorised person ~~as may be prescribed~~ and that serves persons with disabilities may, without the authorization of the copyright owner, make an accessible format copy for the benefit of a person with a disability of a literary or artistic work, or obtain from another authorised person an accessible format copy and supply that accessible format copy to a person with a disability by any means, including by non-commercial lending or by electronic ~~digital~~ communication by wire or wireless means, and undertake any intermediate steps to achieve these objectives, if subject to the following conditions ~~are being met~~:

- (a) The person wishing to undertake any activity under this subsection must have lawful access to the ~~copyright~~ literary or artistic work or a copy of that work;
- (b) the ~~copyright~~ literary or artistic work must be converted into an accessible format copy, which may include any means needed to navigate information in the ~~necessary to create such~~ accessible format copy but which does not introduce changes other than those needed to make the work accessible to a person with a disability;

- (c) such accessible format copies are supplied exclusively to be used by persons with disabilities; and
- ~~(e)~~(d) the activity under this subsection must be undertaken on a non-profit basis."

46 The second element of the definition of "authorised entities" in the Marrakesh Treaty dealt with practices that authorised persons should put in place and follow. M-Net and MultiChoice felt that this element would be better placed in the text of s19D rather than being included in the definition of "authorised persons" we have proposed be inserted in the Copyright Bill. Especially, as practices might be an area where the Minister may wish to make more formal regulations for the purposes of monitoring compliance with Copyright law and an empowering provision to this effect may be necessary here. We therefore propose a new s19D(2) be inserted here with the necessary re-numbering to take place to the existing subsections, e.g. the current subsection (2) to be re-numbered (3) and so forth.

"19D (2) An authorised person must put in place and follow practices:

- (a) to establish that the persons it serves are persons with disabilities;
- (b) to limit to persons with disabilities and/or authorised entities its distribution and making available of accessible format copies;
- (c) to prohibit the reproduction, distribution and making available of unauthorised copies; and
- (d) to maintain due care in, and records of, its handling of copies of literary or artistic works, while respecting the privacy of beneficiary persons in accordance with the provisions of the Protection of Personal Information Act."

47 The Portfolio Committee may also choose to empower the Minister in the Copyright Bill to prescribe regulations to put in place the necessary safeguards to ensure that an authorised persons puts in place the practices contemplated in s19D(2) proposed above

48 It appears that s19D(2) now renumbered (3), in alignment with Article 4 of the Marrakesh Treaty provides a persons with a disability or someone acting on his or her behalf including a primary caretaker or caregiver, to make an accessible format copy of a work for the personal use of the person with a disability or

otherwise to assist the persons with a disability to make and use accessible format copies where the beneficiary person has lawful access to that work or a copy of that work. The only amendment suggested here is to insert the term "electronic communications" and "literary or artistic" in (a) as follows:

"~~(2)~~(3)(a) A person with a disability, or a person that serves persons with disabilities, to whom the work is communicated by electronic communication by wire or wireless means as a result of an activity under subsection (1) may, without the authorization of the owner of the ~~copyright~~ literary or artistic work, reproduce the work for personal use."

Cross-Border Exchange

49 Article 5 of the Marrakesh Treaty deals with Cross-Border Exchange of Accessible Format Copies. It is narrowly formulated to reduce potential harm to rights holders. It provides that:

"Contracting Parties shall provide that if an accessible format copy is made under a limitation or exception or pursuant to operation of law, that accessible format copy may be distributed or made available by an authorized entity to a beneficiary person or an authorized entity in another Contracting Party"

50 Section 19D(3) of the Copyright Bill does not limit the exception to cross border trade between authorised entities or an authorised entity and persons with disabilities in other countries. Instead, it permits cross border trade by any person with a disability or person that serves persons with a disability. This renders it almost impossible to enforce copyright in these works if the import and export taking place is legitimate in terms of the exceptions granted by the Copyright Bill. It is proposed that s19D(3) be re-numbered (4) in line with the other proposed amendments suggested above and in accordance with Article 6 of the Marrakesh Treaty which deals with imports by persons with disabilities and the person who assist them, read as follows:

"~~(3)~~(4) A person with a disability or a person that serves persons with disabilities may, without the authorization of the copyright owner export to or import from another country any legal copy of an accessible format copy of a work referred to in subsection (1), as long as such activity is undertaken on a non-profit basis by that person."

51 To properly reflect Article 5 of the Marrakesh a new s19D(5) should be inserted that reads as follows to deal with cross border exchanges of accessible format copies:

"19D (5) Any authorised person may, without the authorisation of the copyright owner, distribute or make available for the exclusive use of persons with disabilities accessible format copies referred to subsection (1) to an authorised person in another country or to a person with disabilities in another country."

52 Finally, S19D also departs from the objective of the Treaty which as mentioned above wanted to address a problem namely that although popular titles of books are available in braille and audio books accessible by persons with disabilities, lesser known titles which are distributed around the world in numbers far larger than those which are popular are not accessible. The intention in the Treaty is thus not to create a parallel market to the commercial supply of braille and audio books from which copyright owners legitimately derive revenue, but instead to address a market failure of those works which are not available in an accessible format copy. Article 4 of the Marrakesh Treaty thus also offers the opportunity for a contracting party to confine limitations or exceptions under this Article to works which, in the particular accessible format, cannot be obtained commercially under reasonable terms for beneficiary persons in that market. It is unclear why this reasonable limitation to the exception being granted was not included in the Copyright Bill, particularly when read in the context of s28P it makes the need to circumvent TPMs in this case unjustifiable.

53 Accordingly, the following amendments are recommended to the existing s19(4) which would be renumbered (6) if the other amendments proposed above are adopted:

"(4)(6) The exception created by this section is for works which, in the particular accessible format, cannot be obtained commercially under reasonable terms for people with disabilities and is subject to the obligation of indicating the source and the name of the author on any accessible format copy in so far as it is practicable."

54 The illustrative approach above of directly comparing these proposed amendments in the Copyright Bill to the enabling Treaties in a very specific case

clearly demonstrates the amount of work that still needs to be undertaken to get the current version of the Bill ready for publication.

SECTION B: PPA BILL AND INTERNATIONAL TREATIES

- 55 The applicable International treaties to consider in the context of the PPA Bill are the WIPO Performances and Phonograms Treaty, 1996, and the Beijing Treaty on Audiovisual Performances. In our view the Portfolio Committee has dealt with the following elements of the treaties in the context of the Bills, namely moral rights, economic rights, right of reproduction, right of distribution, right of rental, right of making available fixed performances, right of broadcasting and communication to the public, transfer of rights.
- 56 The problems that arise in the PPA Bill are not a result of the Treaty obligations themselves, but how compliance with the obligations is being implemented from an administrative perspective and with how the Copyright Bill creates legal uncertainty because it seeks to confer protection rights on performers,¹⁶ which ought to be done within the strictures of the PPA – a statute which has as its sole purpose the protection of performers. The use of two separate statutory instruments to achieve the same purpose is clearly undesirable. If both the Copyright Bill and the PPA Bill are made law these will be untenable commercially and will result in confusion, duplication and litigation to the prejudice of all industry participants, including performers.
- 57 Compounding the problem is that the two Bills seek to extend these protections to performers in a very similar manner. Indeed, the differences between the performer protections proposed to be conferred in the two Bills, at least insofar as audiovisual works and fixations are concerned, are difficult to discern. What lies at the heart of the problem is that the definition of audiovisual fixation in the PPA is virtually identical to the definition of audiovisual works in the Copyright Bill. We propose the deletion of the performers' protections sought to be introduced into the Copyright Act on the grounds that the PPA is the appropriate statutory instrument to deal with performers' rights.

¹⁶ See, in this regard, section 9 of the Copyright Bill proposing new section 8A of the Copyright Act

SECTION C: OTHER ISSUES

- 58 We are concerned that by restricting submissions to very narrow range of issues the Portfolio Committee will not be addressing other critical issues in both Bills of legal uncertainty, issues of constitutionality not raised specifically by the President, issues of impermissible delegation to the Minister in the PPA Act which will not be addressed by the proposed deletions in the Copyright Bill and issues pertaining to provisions which are so irrational, draconian and wholly unreasonable that they will be challenged in court immediately upon the Bill becoming an Act.
- 59 M-Net and MultiChoice have made previously made submissions on these issues to the Portfolio Committee and have attached a summary of what has been submitted on each Bill in regard to the issues outlined above in Annexure A.

ANNEXURE A – SUMMARY OF PREVIOUS SUBMISSIONS

Comments on the PPA Bill

- 1 Our main submissions concern three sections of the PPA Bill, namely:
 - 1.1 the registration and reporting obligations contained in proposed section 5(1A) of the PPA;
 - 1.2 the provisions of proposed section 5(5) of the PPA, which deals with a broadcaster's obligations to make payments to a performer where payment has already been made to a producer; and
 - 1.3 proposed section 8D of the PPA, which confers wide powers on the Minister of Trade and Industry ("the Minister") to regulate the contractual arrangements of private parties.
- 2 Before we deal with these sections, we raise two issues concerning the definitions.

Definitions

- 3 The definition of "producer" is unclear. It includes reference to the person that "takes the initiative and has the responsibility for the first fixation". It is quite conceivable that the person who takes the first initiative for the first fixation and the person who has responsibility for the fixation will be different people. If that be the case, it is not clear who would be considered the producer. It is also unclear why a person that simply "takes the initiative" to arrange a fixation (which may involve no more than suggesting that a fixation be made) should be considered the producer of that fixation. In our view, the words "*the initiative and has the*" should be deleted from the definition so that the producer is defined, clearly, as "*the person who takes responsibility for the first fixation*".
- 4 Secondly, the definitions of "copyright management information", "technologically protected work", "technological protection measure" and "technological protection" cross-refer to definitions in the Copyright Act. This is undesirable because the Copyright Bill may in fact not be passed or may be

amended in time. It is also unnecessary. These definitions from the Copyright Bill should be repeated in the PPA (rather than simply cross-referring to those definitions).

Proposed section 5(1A) of the PPA

5 As we understand it, proposed new section 5(1A)(a) and (c) of the PPA requires M-Net and MultiChoice, in the first instance, to register every reproduction and broadcast of a fixed performance carried out by them. Although it appears that the manner and form of the registration will be contained in the regulations not yet published, it is, in the first instance, unclear where and with whom M-Net and MultiChoice should register their intentions. This clarification is important, in particular given that proposed section 5(1B) renders non-compliance an offence with sanctions that are draconian in the extreme.

6 More importantly, however, the provisions are unduly burdensome and onerous for broadcasters of audiovisual fixations and firms that exploit audiovisual fixations for commercial gain (such as the SABC, Netflix, YouTube, Amazon and the like); and the sanctions imposed for non-compliance with these provisions are manifestly unreasonable. We note the following in this regard. Although we deal only with MultiChoice it should be understood that the firms to which we have referred above will be in a similar position.

6.1 MultiChoice broadcasts approximately 150 audiovisual channels currently. These include channels that include mostly local content (SABC and Mzansi Magic for example) and channels that include mostly foreign content (such as the BBC and Disney channels). All of this content falls within the definition of an audiovisual fixation in the PPA Bill.

6.2 Most channels are broadcast 24 hours per day, every day. Advertisements, which are also audiovisual fixations, are flighted on every channel. Some channels carry more advertisements than others.

6.3 Each month, MultiChoice broadcasts approximately 108000 hours of audiovisual fixations (films, television series, documentaries,

advertisements etc) on its audiovisual channels. When due regard is had to the advertisements that will form part of any broadcast, it is reasonable to assume that the average broadcast hour will involve the broadcast of about 10 audiovisual fixations (we exclude the reproductions of each fixation that will form part of the broadcast).

- 6.4 Every audiovisual fixation will include fixations of performances by numerous performers. MultiChoice estimates that every hour of television broadcast by it of an audiovisual fixation (including advertisements) will involve at least 50 performances by actors, actresses and musicians (spread across the 10 audiovisual fixations broadcast every broadcast hour).
- 7 It will be evident from what is said above that MultiChoice will, if the PPA Bill is passed, be required to register more than 5 million broadcasts of individual performances every month. This task is so vast as to render the requirement to do so (on pain of severe punishment) clearly unreasonable.
- 8 In addition to its broadcasts, MultiChoice makes available audiovisual fixations of performances on its on-demand platforms, ShowMax and DSTV Now. There are, on average 30 million "play events" (downloads by users) every month. Every one of these play events will involve the making available to the public of numerous performances (because every play event involves numerous actors and actresses) and each performance by each actor and actress may therefore have to be registered in its own right. At the very least every performance on every audiovisual fixation made available on the on-demand platforms would have to be registered as being available. This is, in itself, another unduly burdensome undertaking.
- 9 In addition to these registrations are the separate registrations (for the same broadcasts) which will now apparently be required under the proposed new section 8A(6) of the Copyright Bill.
- 10 It follows that, if these registration provisions are made law, the department or firm charged with administering the registrations will likely be receiving several million registrations every month from MultiChoice alone.

- 11 MultiChoice often does not know what content is going to be included on the channels that it broadcasts. For example, the content of the SABC channels that it broadcasts is determined by the SABC. The same is true of most other "pre-packaged" international channels that are broadcast by MultiChoice. Requiring MultiChoice to ascertain in advance the details of every performance forming part of every film or TV series (fixation) included on its channels is simply unreasonable. MultiChoice simply does not know who performs in every fixation that it broadcasts and has no means of ascertaining these details.
- 12 The same applies in respect of advertisements flighted on these channels. While MultiChoice generally knows what advertisements are flighted, it will not have sufficient information regarding that advertisement (for example, who owns the copyright in it, who performs in it etc.) to comply with the registration requirements.
- 13 Although the burden on M-Net (as a channel producer) will be less than that of MultiChoice, it too will have to register every fixated performance that is screened on its channels, including advertisements. In this regard, the production of a channel necessarily involves the reproduction of fixated performances. We point out that other channel producers will be in a similar position and will also be required to register their reproductions of several hundred fixated performances every day.
- 14 In addition to the channel producers, the advertising houses that produce the advertisements will have to register the reproduction of those advertisements (which include fixated performances). In this regard, in order to supply the advertisement to the channel or MultiChoice in a usable form, the advertising house will have to reproduce that advertisement and in so doing will reproduce a fixed performance of every actor or actress that appears in the advertisement.
- 15 This means that for every registration submitted by MultiChoice, there will be at least two (but probably more) registrations by other firms in the broadcast supply chain that reproduce fixed performances as part of the process leading to a broadcast. Thus, every month, there will be several million registrations (applied

for by firms other than MultiChoice) of "acts" carried out in respect of audiovisual fixations that are ultimately broadcast on MultiChoice's channels (alone).

16 In sum, the sheer volume of registrations which will be brought about by proposed section 5(1A) of the PPA appears not to have been properly appreciated by the drafters of the Bill. MultiChoice obviously cannot be expected to register every broadcast or reproduction of a fixated performance that forms part of its broadcasts; and will simply not be able to do so. It is unreasonable and irrational to expect it to do so. Aside from the burden on MultiChoice and M Net, the administrative burden on the Department of Trade & Industry (if that is the institution where registrations are to take place) is one which it is simply not equipped to handle.

17 The provisions of section 5(1A) are also unnecessary because every performer that appears in a broadcast will have an agreement with the owner of copyright in the audiovisual work that will set out the royalties to which that performer is entitled. The same applies to a performer who has consented to the fixation of his or her performance under the proposed new section 3A of the PPA. The performer can also call on the owner or producer to provide a statement of account. We submit, for these reasons alone, that the proposed new section is so unduly burdensome that it will never pass constitutional muster. It is irrational, unnecessary, and wholly unreasonable. There are, however, further difficulties.

17.1 First, it appears from the wording "*a person who for commercial purposes intends to*" that the drafters of the Bill contemplate that MultiChoice should register its "acts" in advance of the "acts" occurring. This is impossible for the reasons already given. But, in addition, we note that if it is envisaged that the Department of Trade and Industry should be required to consider those applications for registration in any detail, then one can anticipate that the registration process will come to a standstill, and with it, MultiChoice's business. That, needless to say, will have catastrophic consequences for the performers that the PPA Bill seeks to protect.

- 17.2 Secondly, we note that if it is intended that registration of the "acts" can take place after the "acts" have taken place, then it is unclear what time period is permitted for these registrations. Importantly, we note, the PPA Bill makes the non-registration of "acts" a criminal offence. Clarity is therefore required as to the period within which registration is required.
- 18 The second part of proposed section 5(1A) requires that any person that executes an act contemplated in the section (including reproduction and broadcast of audiovisual fixations) for commercial purposes must submit a complete, true and accurate report to the performer (and others) in the prescribed manner for the purpose of calculating the royalties due and payable by that person.
- 19 The scope of the provision is not clear. However, if what will be required is that M-Net and MultiChoice compile a report for every performer that appears on the television channels that it broadcasts setting out how many times that performer's performances on those channels, then the provision is again unreasonable and irrational. Section 5(1A) appears to contemplate that a separate report be sent to every performer whose performance is included in the broadcast. This means that that M-Net and MultiChoice will have to generate in the order of 5 million separate reports every month for every performer whose performances are broadcast on MultiChoice's channels. This is unreasonable. It is also unnecessary for the reasons we have already explained – the performers should, if necessary, seek recourse against the firm with whom they have a contract in respect of that performance. A further difficulty is that M-Net and MultiChoice are often unaware of the names of the actors that appear on the shows that it broadcasts because they have no contractual relationship with them (the contract is between performer and production house or channel provider). It cannot therefore be incumbent upon M-Net and MultiChoice to submit a report to a performer with whom it has no contractual relationship whatsoever and whose identity is unknown. It is simply impossible for it to do so.
- 20 Finally, we note that the reports are not limited to local performers. Aside from the difficulties associated with ascertaining contact details for non-local

performers, it seems to us unlikely that the drafters of the Bill had in mind that international performers receive a report from MultiChoice detailing the fact that their performances were broadcast on MultiChoice's bouquet in a particular month and that they are due to receive a royalty from MultiChoice. But this will be the effect of the provision. And, we note, that it will not be possible, without breaching South Africa's international obligations, to legislate that only local performers receive these reports.

Proposed section 5(1B)

- 21 It is, in the first instance, unclear why failing to submit a report should be a criminal offence. The wrong (if a wrong has been committed) is a civil one relating to the payment by one person of money to another. It is not a matter that should be dealt with as a crime.
- 22 Secondly, the "minimum fines" provided for in section 5(1B) are draconian in the extreme and unreasonable. We note that the fines are orders of magnitude bigger than the fines provided for in section 9 of the PPA (currently), despite the fact that the offences for which the section 9 fines are imposed are far more serious. In addition, the amount of money involved in any contravention (or even a number of contraventions) is likely to be entirely out of proportion to the very substantial financial fine and imprisonment contained in this proposed section.
- 23 Beyond the Act, we note that even in respect of cartel conduct prohibited under the Competition Act, 1998, the maximum fine that may be imposed upon a company is 10% of its turnover. This is, however, the minimum fine which would be imposed in terms of the PPA Bill (if made law). In other words, if M-Net and MultiChoice omit one performance from the 108000 hours of content that it broadcasts every month, it is to be fined at least 10% of its turnover for that single infraction.
- 24 The provisions are extreme and draconian and out of proportion to any possible harm that may result from non-compliance. They are, therefore, also irrational and unreasonable. It also bears mention that, while exceptions are provided for in proposed section 5(1B)(d), the requirement that the offending party show "*substantial and compelling circumstances*" that justify the imposition of a lesser

sentence sets the bar so high that it effectively renders section 5(1B)(d) academic in almost all cases.

- 25 For all these reasons, we submit that the provisions of section 5(1B) are unlikely to pass constitutional muster.

Proposed section 5(5)

- 26 In its current form, section 5(5) serves to avoid the double payment of royalties (under the copyright Act and the PPA) to performers whose performances form part of a sound recording. Thus, for example, if a performance is fixed as a sound recording and the owner of the copyright in the sound recording licences that recording to a broadcaster and receives a royalty from the broadcaster under the licence, the owner of the copyright in the sound recording is required under section 9A of the Copyright Act to share the royalty with the performer.

- 27 The performer could also, however, claim a royalty directly from the broadcaster in terms of section 5(1)(b) of the PPA Act or, where the performer authorised the fixation of his or her work (and thus effectively transferred his or her right to receive royalties for that performance to the producer in terms of section 5(4) of the PPA), the performer may claim a share of the royalties paid by the broadcaster to the producer in terms of section 5(4) of the PPA. Section 5(5) provides, however, that where a payment is made by the broadcaster to the producer and, in turn by the producer to the performer, in terms of section 5(4), the performer cannot also claim a royalty from the owner of the copyright in terms of section 9A of the Copyright Act.

- 28 It is clear that the objective of section 5(5) is to prevent the performer claiming multiple royalties, under different statutory instruments, for the same "act" carried out in relation to his or her fixed performance. Thus, where the performer has received a royalty from the producer of the fixation for, say, the broadcast of his performance, the performer should (clearly) not also be able to claim a royalty from the broadcaster for the broadcast of the same performance.

- 29 The amendments to the wording of section 5(5) of the Act that are proposed in the Bill may not achieve the objective of avoiding double payments to a performer

for the same act carried out in respect of his or her performance. As currently framed, proposed section 5(5) reads:

"(5) Any payment made in terms of subsection (4) shall be deemed to have discharged any obligation by the person who broadcasts or transmits, sells, commercially rents out, distributes or causes communication of the performance to pay a royalty or equitable remuneration, whichever is applicable, to the performer or owner of any copyright subsisting in that audiovisual fixation or sound recording, in terms of sections 8A and 9A of the Copyright Act, 1978 (Act No. 98 of 1978)."

30 It is in the first instance ambiguous to speak of the owner of copyright in an audiovisual fixation because it is not clear whether the drafters of the Bill intended to refer to the producer of the audiovisual fixation or the owner of copyright in an audiovisual work. We assume the latter, given that section 8A of the Copyright Act as proposed to be amended now allows a performer to share in the royalties received by the owner.

31 Beyond the terminology, however, in line with the principle of avoiding double payment, it should also be made clear that the payment by a broadcaster of a royalty to the producer of the fixed performance, who is obligated to share that royalty with the performer, excuses the broadcaster from paying another royalty directly to the performer.

32 To give effect to our submissions, and assuming that the performer protections in section 8A of the Copyright are to be retained, we propose that section 5(5) be amended to read:

"(5) Any payment made to a producer in terms of subsection (4) shall be deemed to have discharged any obligation by the person who broadcasts or transmits, sells, commercially rents out, distributes or causes communication of the performance to pay a royalty or equitable remuneration, whichever is applicable, to:

- (i) the performer in terms of section 5(1)(b) above or in terms of section 8A of the Copyright Act, 1978 (Act No. 98 of 1978) in respect of the same act; and
- (ii) the owner of any copyright subsisting in the sound recording, in terms of section 9A of the Copyright Act, 1978 (Act No. 98 of 1978)."

Proposed section 8D

- 33 The Constitutional Court has held that where the legislature grants functionaries broad discretionary powers, it is required to delineate how those power are to be exercised. The legislature must therefore identify the guidelines for the exercise of the power in the relevant statute.¹⁷
- 34 The Court has also found that the duty to provide guidance for the exercise of a discretion is located in the Bill of Rights:
- "[T]he constitutional obligation on the Legislature to promote, protect and fulfill the rights entrenched in the Bill of Rights entails that, where a wide discretion is conferred upon a functionary, guidance should be provided as to the manner in which those powers are to be exercised."¹⁸
- 35 Where the legislature simply grants a wide unguided power to a functionary, it offends against the rule of law and the provisions are liable to be set aside.¹⁹
- 36 If the Bill is enacted, the Minister must enact regulations prescribing compulsory contractual terms that are to be included in a performer's agreement with a broadcaster, producer or user of a performance. The detail of what the regulations must prescribe is set out in section 8D.
- 37 These new powers given to the Minister completely eviscerate the parties" freedom to contract. On this basis alone, they will not, in our submission, survive a constitutional attack.
- 38 The provisions also involve the Minister in writing contracts for parties and setting royalty rates and tariffs. However, no guidance is provided to the Minister about how these powers should be exercised or what purpose is sought to be achieved by their regulation. Without this guidance, there is a risk that the power may be

¹⁷ *Dawood and Another v Minister Of Home Affairs And Others* 2000 (3) SA 936 (CC) para 54

¹⁸ *Janse Van Rensburg NO and Another v Minister of Trade and Industry and Another NNO* 2001 (1) SA 29 (CC) para 25

¹⁹ *Dawood and Another v Minister Of Home Affairs And Others* 2000 (3) SA 936 (CC) para 70

exercised without due regard for the rights of autonomy, property and free trade that may be affected by the regulation.

- 39 It is no answer to this risk to contend that the Minister will only prescribe terms that adequately protect rights. The Constitutional Court has made it clear that it is impermissible for the legislature to leave the fine balance that is required for the protection of rights to the functionaries alone.²⁰
- 40 In the circumstances, these powers are too broadly framed and are liable to be struck down as unconstitutional.

Comments on the Copyright Amendment Bill

- 41 We have said above that the Copyright Bill will, if made law, create legal uncertainty, lead to litigation and likely impoverish the very people that it seeks to protect. Our reasons follow.
- 42 The Copyright Bill creates legal uncertainty because it seeks to confer protection rights on performers,²¹ which ought to be done within the strictures of the PPA – a statute which has as its sole purpose the protection of performers. The use of two separate statutory instruments to achieve the same purpose is clearly undesirable. If both the Copyright Bill and the PPA Bill are made law there will be untenable commercially and will result in confusion, duplication and litigation to the prejudice of all industry participants, including performers.
- 43 Compounding the problem is that the two Bills seek to extend these protections to performers in a very similar manner. Indeed, the differences between the performer protections proposed to be conferred in the two Bills, at least insofar as audiovisual works and fixations are concerned, are difficult to discern. What lies at the heart of the problem is that the definition of audiovisual fixation in the PPA is virtually identical to the definition of audiovisual works in the Copyright Bill. We propose the deletion of the performers' protections sought to be

²⁰ *Dawood* para 50

²¹ See, in this regard, section 9 of the Copyright Bill proposing new section 8A of the Copyright Act

introduced into the Copyright Act on the grounds that the PPA is the appropriate statutory instrument to deal with performers' rights.

- 44 For these reasons, we strongly recommend that all performer protections be removed from the Copyright Bill. They are already included in the PPA Bill, where they belong.
- 45 More generally, M-Net and MultiChoice are deeply concerned that the provisions of the Copyright Bill will, if they are made law, result in disinvestment in the television production and broadcasting industries and job losses. The starting point in this regard is to recognize that there is no underlying research²² which seeks to justify the amendments proposed by the Copyright Bill and no assessment of their likely impact has been carried out. There is therefore no research available that will enable the Parliament to assess the need for, or the effect of, legislative change in these industries.

The sharing of "royalties" with authors and performers

- 46 Although our concerns regarding the Copyright Bill are wide-ranging, the provisions that are likely to affect M-Net's and MultiChoice's business most directly (and thus investment in the film and televisions industry more generally) are those provision that make it compulsory to share royalties with the authors of works and/or performers.
- 47 M-Net and MultiChoice are broadcasters and are copyright owners in literary works (scripts) and audio-visual works (television programmes) and therefore have an interest in the changes being proposed to introduce s6A and s8A of the Act. These sections permit authors to claim a percentage of royalties received by the copyright owner pursuant to the exploitation of a literary work and performers to do the same in respect of audiovisual works.
- 48 M-Net and MultiChoice appreciate that one of the purposes of the Copyright Bill is to protect the economic interests of authors and creators of works, and we

²² The Farlam Commission, to which reference is made in paragraph 1.2 of the explanatory memorandum, was concerned only with music rights. The Bill, however, extends the Commission's findings to all forms of copyright

support this objective. It is in the interests of all stakeholders in the entertainment industry that authors are fairly compensated. We therefore welcome balanced efforts to address the financial well-being of authors of copyright works.

49 The fundamental difficulty with s6A and 8A, however, is that they contemplate a single remuneration model across all industries, namely a percentage of royalties. In practice, there are numerous different ways in which commercial deals are structured and authors (including production companies) are remunerated for their rights, taking into account the parties' respective objectives and priorities. An audiovisual production could be co-funded, advertising funded, funded by the author or funded by the broadcaster. Amongst other things, the parties could agree –

49.1 that the author will retain ownership of the copyright and license the rights to the broadcaster;

49.2 that the broadcaster will be assigned the right to execute a single act and be licensed none, some or all of the remaining rights in respect of the work;

49.3 on any number of remuneration models, including a fixed fee, royalty, revenue share, etc.; and

49.4 that the rights will be licensed only for particular territories or languages, etc.

50 This is not an exhaustive list. We have highlighted a few examples in an effort to demonstrate that there are numerous commercial models, whilst the Copyright Bill contemplates only a single one-size-fits-all model. The Copyright Bill accordingly eliminates the parties' ability to contract on mutually beneficial terms, by narrowly referring to a share of the "royalty" received by the copyright owner.

51 Proposed new s6A and 8A are accordingly so narrow and inflexible that they are unworkable and unbusinesslike. We are therefore concerned that it will be extremely difficult to implement, and extremely disruptive to our contracting workflows and schedules. Given the vast number of commercial agreements needed

to get television content on air, the impact of the new inflexibly framed s6A and s8A could be that everything simply grinds to a halt.

52 A number of other unintended consequences may arise from the new right to a percentage of royalties after assignment. These include for example:

52.1 Both broadcasters and authors will have less flexibility to negotiate agreements and payments as they see fit.

52.2 Local broadcasters, which currently expend vast resources investing in local content, may have to be more cautious and circumspect. They may reduce their investment in local content, given that they will be liable for ongoing payments of a percentage of royalties received, even where they have fully compensated the copyright author for the assignment of rights in terms of an existing remuneration model, agreed to by both parties.

52.3 The initial payment for assignment of copyright by the owner to the author may decrease, given the ongoing obligation on the owner to share a percentage of royalties received going forward. Authors may therefore be worse off until royalty payments kick-in (which will not necessarily eventualise, as not every work is successful).

52.4 Although some authors may wish to exchange their right to an ongoing percentage of royalties, in favour of a large up-front lump sum payment, the Copyright Bill appears to preclude them from waiving this right in terms of proposed s39B, which deals with unenforceable contract terms. In this way the leverage which authors have in assignment negotiations may actually be reduced by the Bill, instead of enhanced.

53 For all of these reasons, M-Net and MultiChoice are concerned that with the introduction of the new royalty provisions, the Copyright Bill undermines the conditions needed for local television production investment to thrive.

54 If the incentives of broadcasters to invest in local content are reduced, there will likely be a reduction in either the quality or the quantity of local content. This will

likely lead to job losses in the sector. If investment lessens, the entire value-chain suffers, including local copyright creators, who are precisely the stakeholders the Copyright Bill aims primarily to assist.

- 55 We also note, finally, that all of the protections that are afforded in the act to authors and performers extend to highly-paid international authors (for example, Hollywood stars) who have no need for them. That the Bill seeks to protect people who are so obviously able to negotiate their own contractual terms illustrates that the drafters of the Bill have not adequately considered the need for, or the effect of, the proposed legislation.

Interference in the freedom of contract

- 56 It is our respectful submission that the Copyright Bill rigidly and excessively interferes with the parties' freedom to conclude contractual arrangements appropriate for the respective parties, their business models and their sector. In particular, we are concerned that the Copyright Bill substantially erodes all of the parties' flexibility to commercialise their rights, through rigid paternalistic legislation. In this regard, the cumulative effect of the Bill's proposals to –

56.1 make it compulsory for certain agreements to be concluded in the prescribed manner and form;²³

56.2 make certain terms of certain agreements compulsory, by giving the Minister wide, vague and unfettered powers to prescribe compulsory and standard contractual terms to be included in agreements to be entered into in terms of the Act²⁴ and to prescribe royalty rates or tariffs for various forms of use;²⁵

56.3 dictate provisions that certain agreements must include;²⁶ and

²³ See for example clauses 5, 7 and 9 of the Bill inserting s6A, 7A and 8A of the Act

²⁴ Clause 33 of the Bill inserting s39(cG) of the Act

²⁵ Clause 33 of the Bill inserting s39(cl) of the Act

²⁶ See for example clauses 5 and 9 inserting s6A(5) and 8A(4)

56.4 prevent any person from choosing to renounce a right or protection offered by the Act (regardless of any benefit they may have enjoyed by doing so), by making any contractual term which purports to do so unenforceable.²⁷

²⁷ Clause 34 of the Bill inserting s39B of the Act